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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 198

BARTHELMIO DALLI

Petitioner

—against—

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Barthelmio Dalli, respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, which affirmed Petitioner's conviction for violations of narcotics laws 21 U.S.C. §§ 173 and 174. Petitioner was convicted after a jury trial along with a codefendant, Thomas Pytel and on June 13, 1969, both were sentenced as first offenders to twenty years in prison on each of two counts, the sentences to run concurrently.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, § 1251(1). The Court of Appeals for the Second Circuit rendered its decision affirming the conviction on March 30, 1970 and Petitioner's time to file his

application was etxended to May 29, 1970 by order of Associate Justice John M. Harlan, dated April 29, 1970. Petitioner was represented at the trial by Richard Rosenkrantz, Esq., and in the Court of Appeals and on this petition by Ira D. London, Esq.

Questions Presented

1. Whether Petitioner's rights under the Fourth Amendment were violated by the arrest and search in this case and whether probable cause for such search existed.

2. Whether Petitioner's right to due process of law was violated by the trial court in the manner it summarized the evidence for the jury.

Constitutional and Statutory Provisions Involved

The Fourth and Fourteenth Amendment to the United States Constitution are involved herein.

The following statutes are involved.

Statutes Involved

TITLE 21 UNITED STATES CODE SECTION 173

IMPORTATION OF NARCOTIC DRUGS PROHIBITED; exception; CRUDE OPIUM FOR MANUFACTURE OF HEROIN: forfeitures.

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such an ounce of crude opium and coca leaves as a commissioner of narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought

into the United States or such territory under such regulations as the commissioner of narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duty which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by Sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the commissioner of narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific preferences.

Section 174

SAME; PENALTY; EVIDENCE

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have

been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000.00. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.00.

"Whenever on trial for a violation of this Section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see Section 7237(d) of the Internal Revenue Code of 1954."

TITLE 18 UNITED STATES CODE SECTION 2

SECTION 2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Statement of Facts

The Suppression Hearing

John O'Brien, a special agent in the Federal Bureau of Narcotics said that on September 10, 1968 at about 10:00 A.M., he got on the New York Thruway in New York and followed a 1964 Cadillac up to Plattsburg where it arrived about 3:30 P.M. (a-30-32).*

The car was occupied by petitioner, Dalli, and Stanley Simmons, a co-defendant. It was registered to Dalli (a-33).

The car went to a Holiday Inn Motel in Plattsburg and the men checked into Room 243 (a-33-36). The witness left after directing two other agents to watch the windows and he later, about 7:30 P.M., saw a car belonging to one Thomas Pytel come into the parking lot. Pytel got out, went to Room 243 and later met Claude Bourdeau at the other end of the Holiday Inn (a-41a). Bourdeau left, drove to a Howard Johnson Motel about an ⅛ of a mile away and then came back and reparked in the Holiday Inn parking lot. He emerged from the car, carrying something black which appeared to be a valise and he gave it to Pytel when they met at the south door of the Motel (a-41-44). Pytel went up to Room 243. A little while later Bourdeau drove out of the parking lot and, subsequently, Pytel also left (a-47).

Richard Johnson, another agent also followed Simmons and Dalli up on the Thruway (a-49). His testimony was similar to that of O'Brien (a-50-58) except he said that

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* References prefaced with the letter "a" are to Appendix of Appellant's brief in the Circuit Court of Appeals.
References not prefaced with any letters are to pages of stenographer's minutes of original record.

after Bourdeau handed the suitcase to Pytel and returned to his car, Bourdeau drove around the parking lot two times and then returned. Pytel came out of the Motel with a raincoat in his hand. He put the coat in his own car and appeared to count money. He got into Bourdeau's car, then exited and they each drove out of the lot in their automobiles (a-59-60).

A short time later Dalli and Simmons left, the former carrying a black suitcase and Simmons carrying a blue one. The valises were placed in the trunk of Dalli's automobile and the two men drove away about 8:15 P.M. (a-60-61)

John W. Maltz, another agent, told a similar story (a-61-68) and then O'Brien was recalled to the witness stand. He added that after Pytel left the Motel he followed him and on the way up to Canada eventually stopped and arrested him. A search revealed approximately $70,000.00 in United States currency which was in a brown paper bag, under a raincoat, on the back seat of Pytel's car. Bourdeau was also stopped and arrested and about $2,600.00 was found in his pocket.

On cross-examination, O'Brien said that they discovered that Dalli had registered under the name of "Forbes" but that was not learned until all the men had been arrested (a-74).

George R. Halpin, the Assistant Regional Director of the Bureau of Narcotics was also on the scene. When the Dalli car left the parking lot to return to New York, he instructed that it be followed (a-76). He later tried to order that the occupants of the car be arrested but he could not contact his agents. He therefore communicated with the New York State Police (a-77-78).

That occurred *while* Halpin was in the process of following Bourdeau and Pytel and before they were apprehended (a-78).

It was then stipulated that Simmons and petitioner were stopped by New York State Police Officers and while they were stopped, the agents came on the scene and arrested them. A black suitcase was in the trunk of the car, it was opened and about 11 pounds of heroin was found inside. A scale and other implements were found in the blue suitcase (a-79-80).

After the Government rested and probable cause was argued, the Court allowed the Government to present additionable evidence.

John O'Brien was again recalled. He said that in August he received information from a confidential source that a man named John Tamarro at the Beauty Trial Hair Parlor in Brooklyn was a trafficker in drugs. As a result of that tip the witness instituted a surveillance (a-88). Reports of the agents on the surveillance showed that several men frequent the shop, one of whom was Barry Dalli, and another an Albert D'Angelis (a-88). A 24-hour watch was put on Dalli and a check of the New York Telephone Company records on Dalli's home telephone showed a number of telephone calls between May 20 and August 4 made to a Montreal, Canada number listed to Thomas Pytel (a-89).

The records of the Narcotics Bureau showed that Pytel was a suspected lieutenant in an international heroin ring operating in Canada and the Royal Canadian Mounted Police also considered him to be a member of that ring (a-90-91).

In addition, O'Brien said that Dalli and his father went to Rome, Italy on August 28 and came back on September 5. On September 6 or 7, he met Simmons, who was known as a suspected source of supply for heroin, in Brooklyn (a-92).

O'Brien said that his confidential informant had given accurate information in the past but neither his agency or any other agency had made cases based upon that information (a-94). The witness said it was accurate because the information was checked out but he did not go into further detail (a-95). O'Brien also said that other suspected traffickers had been seen frequenting the shop (a-95).

On cross-examination, Agent O'Brien said that he knew that neither Dalli nor Pytel had ever been arrested for narcotics violation (a-97). He also said that the calls to Canada were 5 in number, the last on August 4, about 35 days prior to the meeting (a-98).

The Court denied the motion to suppress and held that probable cause existed. It specifically said that the search of Pytel and Bourdeau at the border on the way to Canada was reasonable and *presumably* lead to the arrest of Simmons and Dalli (a-106).

The Wiretap Hearing

A hearing was held to determine if conversations heard on a New York State wiretap or the information obtained therefrom was turned over to or divulged to Federal officials. The Court wanted to determine if as a matter of fact the Federal activities were based in part on the results of the State wiretapping before it went into the question of

whether the State wiretaps were legal under the new constitutional principles.

At the end of the hearing, the Court determined that there was no connection and no transfer of information and it denied the motion. After the trial it made formal findings and conclusions which were read into the record (674-681).

After the State Police were directed to let defense counsel see all of the material regarding the wiretaps which had ben subpoened, and defense counsel was also given all transcripts and tapes of all conversations intercepted, a hearing was held. Argument was made that one conversation occurring on September 7 between Simmons and Dalli in which they agreed to meet on September 7 was such a conversation which led to Federal activities of an increased nature in that a 24-hour surveillance was ordered and actually began around that time.

Agent O'Brien testified that the Beauty Trial Hair Parlor was first put under observation in August because of the informer information and not because of information obtained through other law enforcement agencies (169). He also said that the informer had not supplied any prior information except the information he then gave him regarding the beauty parlor (a-107).

Agent O'Brien said that the reason that the surveillance suddenly became around the clock was because of the information gotten from a confidential source and the check of the New York Telephone Company records on Mr. Dalli's home telephone (178). He said that the first time he knew that state wiretapping existed, was only a week before the hearing began (188).

Richard J. Johnson, another agent said that he knew of the wiretaps about 3 or 4 weeks before the hearing but that he had no knowledge of them at the time the defendants were arrested (203).

Charles P. Cassini, a Lieutenant with the New York State Police was in charge of the New York investigation and he did not pass any information obtained from the wiretaps to the Federal authorities (211). He did divulge the information to higher State officials and he had no way of telling whether they passed it on to the Federal officers (211). He did recall telling Agent Halpin in August, however, that the State Police had a concurrent investigation going. That occurred at a regular monthly liaison meeting (211-212). He gave most of the specific information he obtained to Lt. Mommel who was working with the Federal Narcotics people (215). He said he only told Agent Halpin that he was "doing our thing", but Mr. Cassini was in charge of wiretaps (221-223).

Agent George Halpin, the man in charge of enforcement for the Federal Narcotics Bureau in the New York area acknowledged that Cassini had inferred he had a wiretap but no specific information of any sort was divulged regarding Dalli or Pytel (240). The existence of State wiretaps was known to him about two weeks prior to trial when it was revealed at a pre-trial conference at which O'Brien was also present (250).

John W. Maltz, another agent who worked on the Dalli surveillance said he worked on it that Spring and also worked with the State Police on a murder investigation that summer (261-262). Some of the same State Police were present at Kennedy Airport when Dalli landed from Europe

but he never discussed wiretaps, never got information from the State Police and did not know of the existence of the wiretap until 2 or 3 weeks prior to the trial (267-275).

The motion was denied (279-282) and a memorandum was later, at the conclusion of the trial, read into the record. (674-681).

The Trial

The trial in chief then began and the evidence regarding the substantive narcotics charges was not substantially different than that adduced on the suppression and wiretap hearing. After some technical proof, including receipt in evidence of the registration records of the Holiday Inn regarding Room 243 for September 10, (309) John J. O'Brien testified and essentially repeated the narrative he had related before. (316-325). After all the people involved left the Holiday Inn, he told the other agents to follow the Chevrolet automobile and he followed Pytel and eventually arrested him and searched him and his vehicle. (325). A brown paper bag on the rear seat of Pytel's car contained $70,745.00 (326) and Bourdeau, who he also arrested had $2,630.00 on his person.

On cross-examination the witness said that he never saw Dalli handle the money or the paper bag (338) nor did he know of any occasion when Dalli was convicted or had anything to do with narcotics. (338).

Richard C. Johnson also participated in following Dalli and Simmons up to Plattsburg and he testified to substantially the same thing as O'Brien had. (399-408). Agent Maltz also testified to those events (412-423) as did Agent Hart (430-431) except that Hart was the officer who actually arrested Dalli. (433). He identified himself and arrested Dalli and Simmons. He took them out of the car,

made a cursory search for weapons and then searched the car. In the trunk he found a blue suitcase containing a scale, a vial of acid, a mixing bowl and a knife (436) and he also found a black valise containing 11 pounds of heroin (439). He had followed the vehicle for 45 minutes and arrested the men when he saw the auto had been stopped by New York State Troopers (447-449).

Prior to the arrest he received no communication of any sort (454).

After Raymond Lateur, of the Royal Canadian Mounted Police testified regarding his surveillance of Pytel from Canada that day (467-474), the 4th and 5th counts of the indictment were dismissed on motion based on the *Leary* case which had just been decided by the Supreme Court (498).

The chemist testified that the substance retrieved from the rear of Dalli's car was heroin (501-503) and three witnesses were recalled for additional testimony, including Agent O'Brien who said that the registration card for the Motel had the name Forbes on it, a name he heard mentioned when Simmons and Dalli had been registering (511).

A State policeman, Kenneth Armstrong, was called by petitioner and he testified regarding stopping of petitioner's car. He said that the federal agents came along just after the car had been stopped and arrested the occupants (547-551).

All sides rested and after summation, the Court gave its charge. After detailing the elements of the charges and what the Government had to prove, the trial court told the jury what the Government contended (A-129-134). The Court detailed the facts that the prosecution claimed it had proven and its description took up four pages of the record whereas

the defendant's contentions were set forth in one short paragraph (A-134). Counsel for petitioner excepted to the charge on the grounds that the manner in which the Court marshalled the evidence was in effect a second summation on behalf of the Government (A-151).

Both men were convicted and petitioner was given a 20 year prison sentence (662).

POINT I

No probable cause existed for the arrest and search of petitioner Dalli. The suppression motion made below should have been granted.

There can be little doubt that the single most important piece of evidence against petitioner without which a conviction would have been imposible, was the heroin found in his automobile after he was arrested on the New York Thruway. It was the possession of the heroin which was the basis for bringing into play the presumption contained in 21 U.S.C. Section 174 and which entirely supported the conviction since all of the other acts of the parties, innocent by themselves, only could take on a sinister character when they are coupled with possession of the narcotics.

It is then clear that the single most important issue of the case at bar is the propriety of the seizure of the contraband and the review of the trial court's denial of the suppression motion brought by petitioner.

It is petitioner's contention that the hearing developed no basis in probable cause for the arrest in this case and that the search of his vehicle thus became an intrusion into his rights under the Fourth Amendment.

The acts of petitioner and Stanley Simmons, the men who came up to Plattsburg from New York City, on the day of the alleged purchase of narcotics, were innocent in themselves as the Court below told the Government before it allowed respondent to reopen the suppression hearing. The Government had rested but when the Court indicated that the only thing that had developed on the hearing were a series of acts which were innocent, it allowed the Government to reopen the hearing and introduce additional facts which occurred prior to the day of the trip from New York to Plattsburg, September 10 (A-75).

The most important element introduced by respondent as bearing on probable cause was informed information. John O'Brien, a special agent in the Federal Bureau of Narcotics, said that in August, he received information from a confidential source that a man named John Tamarro at the Beauty Trial Hair Parlor in Brooklyn was a trafficker in drugs (A-88).

The informant was not named, the source of his information was not revealed and very little else about the nature of the information was testified to. In fact, Agent O'Brien said that the informant had never given them information which led to a case being built against anyone by any Federal agency (A-94), although he did say that informant had given him accurate information in the past (A-95). As it developed, even that latter statement turned out to be in error and it no doubt mislead the trial court because later, on a separate wiretap hearing, when Agent O'Brien also testified, it came out that the informant never had given any information in the past at all (170). It then seemed that the reason O'Brien considered the information accurate was because the license plates described by the informant regarding that particular

information concerning the beauty parlor checked out. As we can see, a statement that a person supplied accurate information on past occasions is vastly superior to what the truth turned out to be here so that when the Court denied the suppression motion, it no doubt in part relied on the statement of the witness, which turned out not to be representative of the actual fact. However, even if it were a correct statement, since there was no amplification or further explanation, it still would have been meaningless.

This Court in the leading case of *Spinelli* vs. *United States* 393 U.S. 410 amplified its previous holding in *Aquilar* vs. *Texas* 378 U.S. 108 and clarified the principals which govern the informant situation.

It is not enough that a police officer gives his opinion that informer information is or was reliable or accurate, but, that determination must be made by a magistrate exercising its neutral, detached and independent judgment. The officer must be able to and must reveal a sufficient amount of facts showing the underlying circumstances from which the informer concludes that violations of law are taking place. It is not enough that conclusory or opinion statements of an informer are made but the reasons for and facts upon which such conclusions are based must be revealed. It is also not enough that an agent state that his confidant was reliable but the reasons for determining the reliability of the informer must also be set forth. There is little doubt that the evidence produced by respondent along those lines did not measure up to *Spinelli* and *Aquilar* nor did it come within the exception of *Draper* v. *United States,* 358 U.S. 307, where the information was so detailed and a predicted crime occurred just as the informer said it would. Here, the information was of general criminal activity, no great detail

was given and there was no predicted specific crimes that were about to take place. The specific nature of the information, the great detail and the prediction of violations which actually come to pass have been recognized as essential to bringing a fact situation within *Draper* so that a search warrant or arrest without a warrant can be upheld. *United States* v. *Acosta*, 411 F. 2nd 627 (5 Cir. 1969); *Herreres* v. *United States*, 411 F.2nd 1198 (9 Cir. 1969); *United States* v. *Simon*, 409 F. 2nd 474 (7 Cir. 1969); *United States* v. *Acarino*, 408 F 2nd 519 (2 Cir. 1969).

In *Acarino*, Judge Feinberg, writing for the Second Circuit, upheld that arrest and search incidental thereto on the basis of *Draper* because the information was extremely detailed and specific and because the source of the informant's information was set forth and its reliability sufficiently established. In addition, conduct observed was suspicious and supported the information supplied. In that case, there was much more probable cause and a greater revelation of the surrounding circumstances than in the case at bar, but the important facet of the opinion is the recognition that *Spinelli* applies to general information regarding crimes, such as at bar, whereas *Draper* comes into play because of the more specific information provided. See also *United States* v. *Simon* Supra; *United States* v. *Mitchell*, 299 F. supp. 1395 (W.D.MO. 1966).

The mere conclusory or opinion statement of the informer is not enough, *United States* v. *Menser*, 360 F. 2nd 199, 203 (2nd Cir 1966) and neither is testimony of the reliability of an informer sufficient unless further circumstances are developed to show how the informer obtained his information. *McCreary* v. *Sigler*, 406 F. 2nd 1264, 1269 FN 2 (8 Cir. 1969); *United States* v. *Roth*, 391 F. 2nd 507 (7 Cir. 1967); *United States* v. *Mitchell*, Supra.

In the case at bar the informant's information was general and did not even mention or apply to petitioner or any of the other's subsequently arrested. In addition, the information was conclusory, the informer had not previously supplied accurate information and the source and basis of his information as well as the circumstances to allow a determination of the reliability to be made were not revealed.

The conduct of petitioner was perfectly innocent and could not alone support a finding of probable cause. This the trial court made clear before it allowed respondent to reopen the suppression hearing to introduce new evidence. (A-75).

The conduct of petitioner was nothing more than a series of innocent acts and even if it had been suspicious it could not have supported an arrest. "... 'furtive' movements alone establish nothing." *United States* v. *Humphrey*, 409 F. 2nd 1055, 1059 (10 Cir. 1969).

All of the other evidence brought out below was likewise not above the level of suspicion at best or police conclusions which also, without substantially more, are meaningless. As this Court said in *Spinelli* at 418:

> "but just a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient."

This Court was talking about the assertion that *Spinelli* was "known" to the FBI and others as a gambler, an assertion which is commonly added to give additional weight to the other facts and circumstances relied upon. There are similar hearsay statements in this case such as the allega-

tion that Pytel was suspected of being part of a Canadian Narcotics ring but that is suspicion of the most tenuous sort, it did not relate to Dalli any way, but on the contrary, the evidence regarding Dalli was that he was not known to have had any arrests for or anything to do with narcotics. (A97, 338).

The other item of suspicion relied on, that more than a month prior to the alleged narcotics transaction, the Telephone Company records show that from May to August, five calls were made between Dalli's home telephone and one registered to Pytel in Canada, is equally incapable of supporting probable cause. Telephone records were also held to be insufficient in *Spinelli* and it is submitted that at bar they are likewise incapable of affording probable cause. There is no evidence showing who made or received those calls and of course no wiretaps were produced which would indicate the conversations. The last call was made more than a month before the meeting in Plattsburg and that evidence is an additional circumstance, insufficient in itself and no more important when the entire situation is reviewed. As was made clear in *Spinelli* and *Aquilar*, and as the Courts have all recognized, merely lumping together insufficient activities which are innocent and only suspicious in themselves, cannot usually give the total facts a greater degree of importance. It is the quality of the circumstances which should control, not the quantity.

Another factor is significant when the action of the trial Court is considered. When the Court denied the suppression motion at the conclusion of the hearing, it said that the search of Pytel and Bourdeau at the Canadian border, the one in which the $70,000.00 in currency was found in Pytel's car, was *presumably lead to the arrest of Simmons*

and Dalli (A-106). That factor was apparently heavily relied on by the Court, the factor which would seem to be of considerable importance, because it was the only one mentioned right after the hearing when the basic reasons for the denial of the motion were apparently freshest in the Court's mind.

The record shows however that the arrest and search of Pytel and Bourdeau and the obtaining of the money could not possibly have lead to the arrest of Dalli. The Court's reliance on that factor was improper and it cannot be considered at all with regards to petitioner Dalli.

Agent Halpin, the Assistant Regional Director to the Bureau of Narcotics, testified at the suppression hearing that when all of the participants left the Motel grounds in their cars, Pytel and Bourdeau headed for Canada and petitioner and Simmons returned to New York, he followed Pytel and directed others to follow petitioner (a-76). He says that *before* he apprehended Pytel and Bourdeau, he tried to communicate with the agents following petitioner to order their arrest but could not contact his agents. Instead, he communicated with the New York State Police (A-77). The petitioner was only arrested because after 40 minutes of following him, the agent saw the State Police stop the car. They then approached the vehicle, identified themselves and made the arrest (A-79). Later on, during the trial, Agent Hart, who actually arrested Dalli, reiterated that fact and that prior to the arrest he had received no communication at all (454).

If no communication was received by the arresting officers then what happened at the Canadian border could not be part of the basis on which the arrest and incidental search

of petitioner Dalli was made. Even if the communication had been received, it still could form part of the probable cause because, as we have seen, the arrest order went out before the Canadian arrest and search took place (A-76).

POINT II

The charge of the Court below was improper in that in effect the jury heard a second summation on behalf of the Government when the Trial Court attempted to summarize the evidence.

Many witnesses were presented on behalf of the Government but petitioner Dalli neither took the witness stand in his own behalf and he only called one witness, a New York State Trooper, whose testimony was brief and unsubstantial, in not really relating to the gravaman of the charges. In fact, except for that that witness, there was no defense evidence introduced nor did any defendant testify.

As this Court knows full well, although the amount of evidence was one-sided, its credibility was still a matter for the jury and if portions of that evidence were not believed, a reasonable doubt would exist or it might very well be that even though the evidence may have been truthful, the Government could still fall short of the necessary quantum of proof regarding each and every element regarded to be proven with respect to any particular crime. At any rate, especially in a case where most of the evidence is introduced by one party, the summations of counsel become extremely important and in fact as far as the defendant is concerned it may be the only thing he can rely on in hopes of gaining an acquittal. Thus, where a Court makes its opinion known to a jury or unfairly summarized the facts so that it is decidedly more favorable to one side, a fair trial is unobtainable.

Argumentative changes are improper, even if based on testimony, *Boatright* v. *United States*, 105 F. 2nd 737; *United States* v. *Farrington*, 389 F. 2nd 357, and where all of the evidence is being presented by the Government, the defendant being silent, a Court should be very careful when it discusses that evidence. *Wayne* v. *United States*, 318 F. 2nd 205, Cert. den. 375 U.S. 860. Comments must be fair and the Court should not overemphasize any aspects of the testimony. *Ray* v. *United States*, 367 F. 2nd 258, Cert. den. 386 U.S. 913; *Dulcey* v. *United States*, 255 F. 2nd 721, Cert. den. 357 U.S. 927; *United States* v. *England*, 347 F. 2nd 425; *Ewing* v. *United States*, 386 F. 2nd 110, Cert. den. 390 U.S. 991.

In *Boatright* v. *United States*, supra at 741, the Court said:

> "The trial judge should state the facts not only with accuracy but with fairness, referring both to that which is favorable to the defendant and that which is unfavorable to him. An argument even though based upon the testimony is quite out of place in the Court's charge to a jury in a criminal case."

In *United States* v. *Switzer*, 252 F. 2nd 139, Cert. den. 357 U.S. 922, the Second Circuit declared that although a Court could still summarize the evidence even if it was uncontroverted, it should still be fair. It was also pointed out that no exception had been taken and apparently counsel at that time regarded the charge as satisfactory.

In the case at bar, the trial court detailed each and every "contention" of the Government and pointed out each and every piece of evidence, in detail, which had been introduced against petitioner. This process took about four pages of the charge (A-129-134) although it only took the Court one short paragraph to summarize the case from the defendant's point of view (A-134).

Counsel for petitioner immediately expresed his dissatisfaction with that portion of the charge and pointed out specifically that it amounted to a second summation on the part of the Government (A-151). Failure to object which was present in *Switzer* is thus absent here.

Petitioner can see no good reason to allow summarizations of evidence in cases such as the one at bar where the evidence is so one-sided because it can serve no valid purpose but to reiterate the prosecution's case and it can amount to nothing more than an additional summation on behalf of the government. In the case at bar, the marshalling of the evidence in such a manner effectively operated to deprive the petitioner of a fair trial.

CONCLUSION

The petition for certiorari should be granted and the judgment reversed.

Respectfully submitted,

IDA D. LONDON
Attorney for Petitioner
547 86th Street
Brooklyn, N. Y.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 572 and 573—September Term, 1969.

(Argued March 5, 1970 Decided March 30, 1970.)

Docket Nos. 33746 and 34145

UNITED STATES OF AMERICA,

Appellee,

—v.—

BARTHELMIO DALLI and THOMAS PYTEL,

Appellants.

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and DOOLING, *District Judge.**

Appeals from judgments of conviction for violations of narcotics laws 21 U.S.C. §§173 and 174, entered on jury verdicts of guilty, in the United States District Court, Northern District of New York, Lloyd F. MacMahon, *Judge,*** affirmed.

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* Of the Eastern District of New York, sitting by designation.

** Of the Southern District of New York, sitting by designation.

IRA D. LONDON, Esq., Brooklyn, N. Y., *for Appellant Dalli.*

DAVID M. MARKOWITZ, Esq., New York, N. Y., *for Appellant Pytel.*

PAUL V. FRENCH, Assistant U. S. Attorney, Northern District of New York (James M. Sullivan, Jr., U. S. Attorney, Northern District of New York, on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

Barthelmio Dalli and Thomas Pytel each appeal from judgments of conviction on one count of selling, receiving and concealing five kilograms (approximately eleven pounds) of heroin in violation of 21 U.S.C. §§173 and 174, and on one count of conspiracy to commit the substantive offense, in violation of 18 U.S.C. §371. Both were sentenced, as first offenders, to twenty years imprisonment on each of the two counts, the sentences to run concurrently.

The events which led to the arrest of appellants were as follows: Early in the month of August, 1968, federal narcotics agent John J. O'Brien received a tip from an informer that the Beautee Trail Hairstyle Shop in Brooklyn was a center for heavy narcotics traffic. Acting on this information federal agents established a continuous surveillance of the beauty shop, which was at the time closed for alterations and employees' vacations. In spite of this, a number of persons continued to frequent the establishment, including the appellant Dalli. Because of his activities at the Beautee Trail, Dalli, individually, was placed under continuous surveillance. The agents also examined

the records of the New York Telephone Company which disclosed that between May 20th and August 4, 1968, a number of calls had been placed from Dalli's telephone to a number in Montreal, Quebec, listed in the name of Thomas Pytel. An inquiry of the Royal Canadian Mounted Police verified the agent's records in New York that Pytel was probably a member of the Montreal narcotics ring headed by one Guiseppi Controni.

The surveillance of Dalli was halted when he made a trip to Rome in the latter part of August, but it was resumed when he returned on September 5th. On September 6th Dalli was observed meeting with Stanley Simmons, a reputed supplier of heroin. Dalli again met Simmons in Brooklyn on September 10th. They both left in an automobile and drove north on the New York Thruway. Several federal narcotics agents, including Agent O'Brien, followed them to Plattsburg, New York, where they arrived at 3:30 p.m. Dalli and Simmons went directly to the Holiday Inn, where one of the agents overheard them registering at the desk under the fictitious names of "Forbes." They then went to room number 243, which the clerk had given them. Meanwhile, federal narcotics agents had established an extensive surveillance of the Holiday Inn and its environs.

All was quiet until 7:00 p.m., when Simmons emerged from the Inn, took a blue suitcase from the trunk of Dalli's car, and returned, suitcase in hand, to room 243. Soon afterward one Claude Bourdeau drove into the Holiday Inn parking lot in a Chevrolet convertible which he parked and in which he remained. At approximately 7:30 p.m. the agents saw Pytel arrive at the Inn in yet a third car, which

he parked next to the convertible occupied by Bourdeau. Pytel then entered the Inn.

Not long after Pytel's arrival Dalli and Simmons came out of the Inn and searched the parking lot; they looked in the windows of the parked cars and otherwise closely examined the entire area. After about ten minutes of this activity they returned to their room. A few minutes later Bourdeau drove from the Inn up the road a short distance to the Howard Johnson's Motor Lodge. He soon returned to the Holiday Inn and handed a black valise to Pytel who carried it up to room 243. Shortly thereafter he was observed waving from the window of that room. Bourdeau responded by twice driving around the parking lot. Bourdeau then parked his car, entered the Inn, and about one minute later returned to the car. After another brief wait, Pytel emerged from the Inn carrying a raincoat over his arm. He went directly to Bourdeau's car and handed him a brown paper bag, which Bourdeau examined. He counted its contents and then returned the bag and contents to Pytel who returned to his own car and placed the brown paper bag on the back seat. He and Bourdeau then both left the Inn and headed north, each in his own vehicle, with federal agent in close pursuit.

Shortly after the departure of Pytel and Bourdeau, Dalli and Simmons also left the Inn. They were observed carrying a blue suitcase and a black valise, which were placed in the trunk of Dalli's Cadillac and covered with a blanket. They then headed south, followed by federal agents.

The agents following Pytel and Bourdeau stopped and arrested them at Champlain, New York, as they neared the Canadian border. A search incident to the arrest revealed

$2,600 in Bourdeau's pockets and a brown paper bag containing $70,000 in cash on the rear seat of Pytel's car. Meanwhile, Dalli and Simmons, who had been stopped by the New York State Police on the request of the federal authorities, were also placed under arrest by pursuing federal narcotics agents. A search of Dalli's Cadillac revealed the blue suitcase containing a scale and the black valise which had in it five kilograms of pure heroin.

Pytel and Bourdeau, both Canadian citizens, were deported to Canada. As deportees, they could not legally reenter this Country without the prior approval of the Attorney General or his designated agent. 8 U.S.C. §1326. Bourdeau's mobility was further hampered by the fact that upon his return to Canada he was picked up as a parole violator and confined to St. Vincent DePaul Prison, near Montreal.

Following the filing of the indictment on December 10, 1968,[1] the defendants made a number of motions, of which one sought the suppression of certain evidence, including the five kilograms of heroin, on the ground that it had been seized as incidental to an illegal arrest. After a hearing, held by the district court on May 12, 1969, this motion was denied. The only defendant to appear at this suppression hearing was Dalli; Simmons was absent because he had absconded, Bourdeau because he was imprisoned in Canade, and Pytel be-

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[1] Count one of the five-count indictment charged the four arrested with conspiracy to sell, receive and conceal heroin. Count two charged Pytel and Bourdeau with the illegal sale and concealment of heroin, and count three charged Dalli and Simmons with illegal purchase and concealment of the drug. Counts four and five, which charged the defendants with the sale and purchase of heroin in other than the original stamped package, were subsequently dismissed by the district court for reasons not here pertinent.

cause he had not received permission to reenter the United States in order to attend the hearing.[2]

The major issue on this appeal is Pytel's claim that the holding of the hearing in his absence was violative of his Sixth Amendment right to confrontation and Rule 43, F. R. Crim. P., and that his conviction should, therefore, be reversed.

Although a defendant has a right to be present at a suppression hearing where testimony is to be taken, see 8A J. Moore, *Federal Practice* ¶43.03[1] (2d ed. 1969); 3 C. Wright, *Federal Practice & Procedure* §721 (2d ed. 1968), this right is not absolute and may be relinquished by acts or statements of the defendant which constitute a voluntary waiver. *Diaz* v. *United States*, 223 U.S. 442, 453-459 (1912); *Burley* v. *United States*, 295 F.2d 317, 318-319 (10th Cir. 1961); *Glouser* v. *United States*, 296 F.2d 853, 855-856 (8 Cir. 1961), *cert. denied*, 369 U.S. 825 (1962). There was such a waiver by Pytel in the present case. Pytel had know for at least six weeks that the suppression hearing was assigned for May 12. He also knew that it would be necessary to obtain authorization from the Attorney General or his delegate to be permitted to enter the United States to attend court; indeed, he had been granted such permission on at least two prior occasions. He nevertheless made no efforts to secure the required permit or even to notify the court or the prosecuting attorney that such permission was lacking. He was well aware that under the circumstances he did not have to follow the full

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[2] Following the suppression hearing the district court severed the trials of Simmons and Bourdeau because it was impossible for them to be present at the joint trial.

formalities for obtaining a re-entry permit (see 8 C.F.R. §212.2 (1969)), to attend a federal court in a criminal proceeding in which he was involved. He knew this from his own experiences. He had only to make a simple request to the Assistant United States Attorney that such authorization be granted. He also could have petitioned the court. Pytel certainly knew that he had not received permission to enter the Country in time for the hearing, and by not making the small effort required to request a permit, or even to notify the prosecuting attorney or the court that such a permit was lacking when he knew of its necessity, Pytel voluntarily waived his right to be present at the suppression hearing.[3] See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Cureton* v. *United States*, 396 F.2d 671, 675-676 (D.C. Cir. 1968).

Both appellants urge that it was error for the district court to find that the federal agents had probable cause to make the arrests because they had no proof of the reliability of the informer. But this is not a case where the arrest turned on the reliability of the informer and the information received from him. The only activity flowing from the tip-off was the establishment of the surveillance at the Beautee Trail Hairstyle Shop which independently led to the discovery of Dalli's involvement and eventually to the observation of the appellants' activities in Plattsburg on September 10th. It was these observed activities, including the motel registration under an assumed name, the sur-

[3] The record indicates that had Pytel or his counsel properly notified the Assistant United States Attorney as late as the day before the scheduled hearing, his entry into the United States could have been assured by a telephone call or telegram to the appropriate border officials.

reptitious exchange of the suitcases, and the other forms of strange behavior of the appellants, all observed by the Government agents, which provided sufficient evidence for probable cause to make the arrests. See *United States* v. *Malo*, —— F.2d —— (2 Cir. October 14, 1969); *United States* v. *Gazard Colon*, 419 F.2d 120 (2 Cir. 1969).

Pytel also argues that it was error for the district court to proceed to trial in the absence of the co-defendant Bourdeau, who, Pytel claims, would have been his major defense witness. We disagree. Bourdeau was imprisoned by Canadian authorities eight months before the trial in the present case. Yet at no time prior to the suppression hearing did Pytel move under Rule 15, F. R. Crim. P., for leave to take Bourdeau's deposition. Neither has Pytel shown that Bourdeau would have been willing to take the stand if he had been present (he was, after all, a co-defendant with a prior criminal record); or that, if he had testified, the evidence he would have given would have been at all helpful to Pytel's case. No prejudice was shown. Under these circumstances the district court's refusal to adjourn the trial because of Bourdeau's absence was not error. See Rule 52 (a), F. R. Crim. P.

Dalli's remaining claim is that the marshaling of the evidence by the district court over-emphasized the Government's case and was, therefore, prejudicial to appellants. We have carefully examined the charge to the jury and find no error. The marshaling of the evidence was fair and unbiased and the greater length devoted to the discussion of the Government's case derived from the fact that the defendants failed to present any evidence of their own. See *United States* v. *Tyminski*, 418 F.2d 1060 (2 Cir. 1969).

The remaining points raised by appellants do not require or merit discussion.

The judgments of conviction are affirmed.

APPENDIX B

Judgments of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of March, one thousand nine hundred and seventy.

Present: HON. J. EDWARD LUMBARD,
Chief Judge

HON. ROBERT P. ANDERSON,
Circuit Judge

HON. JOHN F. DOOLING, JR.,
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STANLEY SIMMONS, BARTHELMIO DALLI, THOMAS PYTEL, and CLAUDE BOURDEAU,

Defendants,

BARTHELMIO DALLI and THOMAS PYTEL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1969

BARTHELMIO DALLI,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 29th, 1970.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 29th
day of April, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1627

BARTHELMIO DALLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 2271 Misc.

THOMAS PYTEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of New York, petitioners were convicted on one count charging the sale, receipt and concealment of approximately eleven pounds of illegally imported heroin, and on one count of conspiracy to commit that offense, in violation of 21 U.S.C. 174. Each was sentenced to concurrent prison terms of twenty years. The court of appeals affirmed (Pet. 23-30).

Petitioner Dalli contends that probable cause was lacking to support his arrest pursuant to which the suitcase containing the heroin was found. He also argues that the trial judge's decision to summarize the evidence was an abuse of discretion. Petitioner Pytel argues that his Sixth Amendment rights were violated by the holding of a hearing on a pre-trial motion to suppress in his absence. These contentions are answered in the opinion of the court below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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